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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 GCG ASSOCIATES LP, a Washington
10 limited partnership,

11 Plaintiff,

12 v.

13 AMERICAN CASUALTY COMPANY
14 OF READING PENNSYLVANIA, a
15 foreign insurer authorized to do business
16 in Washington,

17 Defendant.

18 CASE NO. C07-792BHS

19 ORDER DENYING
20 PLAINTIFF'S MOTION FOR
21 RECONSIDERATION

22 This matter comes before the Court on Plaintiff's Motion for Reconsideration Re:
23 Burden of Proof (Dkt. 65). The Court has considered the motion and the remainder of the
24 file and hereby denies the motion for the reasons stated herein.

25 **I. BACKGROUND AND DISCUSSION**

26 Motions for reconsideration are governed by Local Rule CR 7(h), which provides
27 as follows:

28 Motions for reconsideration are disfavored. The court will ordinarily deny
such motions in the absence of a showing of manifest error in the prior
ruling or a showing of new facts or legal authority which could not have
been brought to its attention earlier with reasonable diligence.

29 Local Rule CR 7(h)(1). Plaintiff seeks reconsideration, contending that the Court's ruling
30 constitutes a manifest error. Dkt. 65.

1 On August 8, 2008, the Court ruled on several motions for summary judgment.
2 Dkt. 55. Specifically, the Court declined to rule that Defendant bears the burden of
3 proving what amount of loss or damage, if any, occurred outside of the policy periods.
4 Dkt. 55 at 9. Plaintiff analogized to *Diamaco, Inc. v. Aetna Cas. & Sur.*, 97 Wn. App. 337
5 (1999), and *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 432 (2002). The Court
6 summarized both cases as declining to consider exclusions as part of the inquiry into
7 whether coverage is triggered. Dkt. 55 at 8. The Court denied Plaintiff's motion as
8 follows:

9 By asking the Court to require American Casualty to bear the burden of
10 proof as to whether the claimed loss or damage commenced during the
11 policy period, GCG effectively asks the Court to construe this policy
12 provision as an exclusion. The policy contains a section devoted to
13 exclusions and limitations; the provision regarding commencement of
14 loss or damage during the policy period is not identified as an exclusion
15 and is found in a separate portion of the policy altogether. GCG offers no
16 authority for construing a portion of the policy outside of the exclusion
17 section to constitute an exclusion. The Court is instead persuaded by the
18 approach in *Federal Deposit Ins. Corp.*, a case decided under California
law. *Federal Deposit Ins. Corp. v. New Hampshire Ins. Co.*, 953 F.2d
478 (9th Cir. 1991). There, the Ninth Circuit declined to construe a
limitation as an exclusion because such an "interpretation of the
agreement ignore[d] the fact that the bond contain[ed] a section that
clearly label[ed] the conduct that [wa]s excluded from the policy under
the heading 'Exclusions.'" *Id.* at 483. Here too, the Court declines to
construe the commencement requirement as an exclusion because the
policy does not identify it as such.

19 *Id.* at 8-9.

20 In contending that the Court's ruling constitutes manifest error, Plaintiff relies
21 primarily on *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, (1975), and *In re Feature*
22 *Realty Litig.*, 2007 U.S. Dist. LEXIS 53702 (E.D. Wash. 2007). In *Salzberg*, the
23 Washington Supreme Court held that "public policy requires that an alleged breach of a
24 cooperation clause may be considered substantial and material, and may effect a release
25 of an insurer from its responsibilities only if the insurer was actually prejudiced by the
26 insured's actions or conduct," regardless of whether the cooperation clause appears as a

condition precedent or a covenant. *Salzberg*, 85 Wn.2d at 377. *Salzberg* did not concern the type of policy provision at issue here.

Similarly, Plaintiff cites *In re Future Realty Litigation* for the proposition that “[u]nder Washington law, the burden of demonstrating non-compliance with notice and cooperation policy provisions is on the insurer.” *In Re: Feature Realty Litigation*, 2007 U.S. Dist. LEXIS 53702 at *36. Plaintiff did not move for summary judgment regarding which party bears the burden of proving non-compliance with policy provisions; rather, Plaintiff moved for summary judgment as to which party bears the burden of proving the amount of loss occurring during or outside of the policy period. The Court did not commit manifest error in declining to place the burden of proof on Defendant on the grounds that the relevant policy provision is not an exclusion.

II. ORDER

Therefore, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration Re: Burden of Proof (Dkt. 65) is **DENIED**.

DATED this 26th day of August, 2008.



BENJAMIN H. SETTLE
United States District Judge